Supreme Court, U.S.
FILED
98 91 JUL 8 1998

No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

TRACY THORNE,

Petitioner,

v.

UNITED STATES DEPARTMENT OF DEFENSE;
WILLIAM S. COHEN, SECRETARY OF DEFENSE;
UNITED STATES DEPARTMENT OF THE NAVY; AND
JOHN H. DALTON, SECRETARY OF THE NAVY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

CLIFTON S. ELGARTEN
Counsel of Record
CHRISTOPHER M. FARRIS
BARRY M. PARSONS
JEFFREY E. GREENE
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2595
(202) 624-2500

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

135 pp

QUESTIONS PRESENTED

1. Does the federal government's "Don't Ask, Don't Tell" policy on military service by homosexuals, which subjects gay servicemembers to discharge if they ever tell anyone that they are gay or engage in other non-verbal communicative acts, violate the First Amendment's guarantee of freedom of speech and association?

2. Does the federal government's "Don't Ask, Don't Tell" policy on military service by homosexuals, which punishes gay servicemembers who reveal their sexual orientation or engage in other non-verbal communicative acts for presumptively engaging in acts that are permitted to heterosexuals, violate the constitutional guarantee of equal protection of the laws?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE.....2

The Don't Ask, Don't Tell Policy.....2

Petitioner's Naval Career and Premature Separation.....4

The Courts Below 8

REASONS FOR GRANTING THE PETITION 9

I. This Case Presents Questions of Exceptional Constitutional Importance That Have Been Wrongly Decided By the Courts Below 12

A. The "Don't Ask, Don't Tell" Policy Violates Lt. Thorne's Core First Amendment Rights To Freedom Of Speech And Association 12

B. Petitioner's Right to the Equal Protection of the Laws Has Been Violated.....19

II. Discharges of Gay and Lesbian Servicemembers Under "Don't Ask, Don't Tell" Are Increasing at an Alarming Rate 29

CONCLUSION.....30

APPENDIX A: Opinion of the United States Court of Appeals for the Fourth Circuit (Apr. 9, 1998) 1a

APPENDIX B: Memorandum Opinion of the United States District Court for the Eastern District of Virginia (Nov. 20, 1996) 3a

APPENDIX C: Memorandum Opinion of the United States District Court for the Eastern District of Virginia (Mar. 4, 1996) 16a

APPENDIX D: Transcript of Proceedings, Board of Inquiry (July 14, 1994) 44a

APPENDIX E: Memorandum of Separation from The Chief of Naval Personnel (Mar. 9, 1995).....45a

APPENDIX F: First and Fifth Amendments to the United States Constitution 47a

APPENDIX G: National Defense Authorization Act of 1994 (10 U.S.C. § 654) 48a

APPENDIX H: Department of Defense Directive 1332.30 (Dec. 21, 1993) 53a

TABLE OF AUTHORITIES

Cases **Page**

Arkansas Writers' Project, Inc. v. Ragland, 481 U.S.221 (1987).....17

Board of Estimate of City of New York v. Morris, 489 U.S. 688(1989) 20

Brown v. Board of Educ., 349 U.S. 294 (1955) 27

Brown v. Glines, 444 U.S. 348 (1980).....16

Cammermeyer v. Aspin, 850 F. Supp. 910 (W.D. Wash. 1994) 25

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) 24, 26

Crawford v. Board of Educ. of Los Angeles., 458 U.S. 527 (1982).....21

Davis v. Bandemer, 478 U.S. 109 (1986).....20

Department of Agric. v. Moreno, 413 U.S. 528 (1973) 24

Elzie v. Aspin, 897 F. Supp. 1(D.D.C. 1995) 15

Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) 17, 18, 25

Frontiero v. Richardson, 411 U.S. 677 (1973).....20

Graham v. Richardson, 403 U.S. 365 (1971).....20

Greer v. Spock, 424 U.S. 828 (1976).....16

Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) 27

Hunter v. Erickson, 393 U.S. 385 (1969).....20

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 570 (1995).....15

Korematsu v. United States, 323 U.S. 214 (1944).....24

Kramer v. Union Free Sch.. Dist. No. 15, 395 U.S. 621 (1969).....20, 21

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1933).....15

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 13

NAACP v. Claiborne Hardware, 458 U.S. 886, (1982) 13,14

New York Times Co. v. Sullivan, 376 U.S. 254, (1964).....12

Palmore v. Sidoti, 466 U.S. 429 (1984) 23, 26

Pickering v. Board of Education, 391 U.S. 563 (1968) 16

Police Dep't of Chicago v. Mosely, 408 U.S. 92 (1972) 15

Plyler v. Doe, 457 U.S. 202 (1981).....21

R.A.V. v. City of St. Paul, 505 U.S. 377(1992) 14, 15, 16

Reno v. ACLU, ___ U.S.___, 117 S. Ct. 2329 (1997).....18

Reynolds v. Sims, 377 U.S. 533 (1964).....20

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).....12

Roberts v. United States Jaycees, 468 U.S. 609 (1984).....13

Robinson v. California, 370 U.S. 660 (1962).....18

Romer v. Evans, 517 U.S. 620(1996).....20, 24

Rosenberger v. Rector and Vistors of Univ. of VA, 515 U.S. 819 (1995) 15, 16

Rostker v. Goldberg, 453 U.S. 5 (1981).....24, 28

Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105 (1991) 15, 16

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).....20

Terminiello v. Chicago, 337 U.S. 1 (1949).....17

Texas v. Johnson, 491 U.S. 397 (1989).....17

Thomasson v. Perry, 80 F.3d 915 (4th Cir.), *cert. denied*, ___U.S.___, 117 S. Ct. 358 (1996) 8, 21

Thorne, 961 F.. Supp 1358 (E.D. Va. 1996).....5

United States v. Carolene Products, 304 U.S. 144 (1938).....20, 21

Turner Broadcasting System, Inc. v.FCC, 512 U.S. 622 (1994).....14

United States v. Eichman, 496 U.S. 310 (1990)....17

United States v. National Treasury Employees Union, 513 U.S. 454 (1995) 16

United States v. Virginia, 518 U.S. 515 (1996) 25, 26, 27, 28

Vance v. Bradley, 440 U.S. 93 (1979).....21

Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982).....20

Statutes

10 U.S.C. § 654 .....*passim*

10 U.S.C. § § 801 *et seq*.....26

Department of Defense Directive No. 1332.30..*passim*

Other Authorities

Arthur P. Brill, Jr., *The Grounding of Lt. Thorne*, Wash. Post, June 2, 1992, at A19 6

Kelly E. Henriksen, Note & Comment, *Gays, the Military, and Judicial Deference: When the Courts Must Reclaim Equal Protection As Their Area Of Expertise*, 9 Admin. L.J. Am. U. 1273 (Winter 1996) 25

C. Dixon Osburn et al., *Servicemembers Legal Defense Network, Conduct Unbecoming: The*

Third Annual Report on "Don't Ask, Don't Tell, Don't Pursue" (1997).....29

ABC Nightly News, Apr. 6, 1998, *available in* Lexis, News Library, ARCNWS File.....29

Nightline, ABC News, May 19, 1992, *available in* LEXIS, News Library, ARCNWS File 5, 28

Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings on H.A.S.C. No. 103-19 Before the Committee on Armed Services House of Representatives, 103d Cong., 1st Sess. (1993).....23, 25

The Issue: Barring Gays from the Military, AP, Mar. 16, 1992, *available in* 1992 WL 5289570 5

PETITION FOR WRIT OF CERTIORARI

Tracy Thorne respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, issued *per curiam*, is not reported (App. 1a). The first opinion of the United States District Court for the Eastern District of Virginia (App. 16a) is reported at 916 F. Supp. 1358. The second opinion of the United States District Court for the Eastern District of Virginia (App. 3a) is reported at 945 F. Supp. 924. The findings of the Board of Inquiry (App. 44a) and the separation order (App. 45a) are not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 9, 1998. App. 1a. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the following are provided in the Appendix: the First Amendment to the United States Constitution (App. 47a); the Fifth Amendment to the United States Constitution (App. 47a); Section 571 of the National Defense Authorization Act of 1994 (10 U.S.C. § 654) (App. 48a); and Department of Defense Directive No. 1332.30 (App. 53a).

STATEMENT OF THE CASE

This case challenges the constitutionality -- on its face and as applied -- of the statute and implementing regulations known as "Don't Ask, Don't Tell." Petitioner, a top-gun Naval Flight Officer in the United State Navy, was dismissed solely because he stated that he is gay. The policy offends the most basic notions of liberty and fairness in the Constitution.

The "Don't Ask, Don't Tell" Policy

Congress enacted the "Don't Ask, Don't Tell" policy on November 30, 1993 as part of the National Defense Authorization Act of 1994 ("the Act"). 10 U.S.C. § 654 (App. 48a). The Act purports to embody the finding that a servicemember's homosexual orientation is not incompatible with military service. *Id.* § 654(a)-(b) (App. 48a-51a). Nevertheless, the Act subjects a servicemember who states that he or she is homosexual to a full Board of Inquiry proceeding to determine whether that servicemember is a "person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." *Id.* § 654(b)(2) (App. 51a) While the Act provides no

definitions for the terms "propensity" or "intends," it defines "homosexual act" as

> (a) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and
>
> (b) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (b).

Id. § 654(f)(3) (App. 52a). Thus, according to the Act, innocuous activities such as hand-holding or kissing a member of the same gender may constitute a dischargeable "homosexual act."

The Department of Defense ("DoD") issued directives implementing the Act in December 1993. *See* DoD Dir. 1332.30 (App. 53a).[1] At first glance, the directives embody the purported policy of the Act by providing that "homosexual orientation is not a bar to continued service unless manifested by homosexual conduct." *Id.* at Enc. 2, ¶ C (App. 60a). Like the Act, however, the directives eschew this policy by including the statement "I am gay" as actionable homosexual conduct. Under the directives, that statement of identification -- even if made off-base, to a civilian, or, as in this case, in the midst of a national dialogue on the issue of civil rights -- subjects the servicemember to a full Board of Inquiry proceeding during which the

---

[1] DoD Directive 1332.30, pursuant to which Lt. Thorne was separated, applies to regular commissioned officers. DoD Directive 1332.14, which applies to enlisted personnel, is identical in all material respects to DoD Directive 1332.30.

servicemember must present evidence demonstrating that he or she is not a person who "engages in homosexual acts or has a propensity or intent to do so." *Id.* at Enc. 2., ¶ C.1.b. (App. 60a). Moreover, like the Act, the directives proscribe any communicative act that is not a statement, but that a "reasonable" person would conclude "demonstrates a propensity or intent" to engage in homosexual acts. There is no proscription in the policy for similar acts -- such as hand-holding or putting an arm around a friend -- by heterosexuals.

PETITIONER'S NAVAL CAREER AND PREMATURE SEPARATION

Throughout his naval career, Lt. Thorne repeatedly demonstrated that he possesses, to an extraordinary degree, the qualities of leadership, discipline, competence, integrity, and courage that the Navy seeks in its junior officers. Lt. Thorne's superlative abilities were consistently recognized during his five years of active duty service. *See generally* COA App. 169-172.

As the District Court recognized:

> By all accounts, had Lieutenant Thorne not publicly announced that he was a homosexual, he would be an exemplary Naval Officer. In May of 1989, Thorne began his military career by entering Aviation Officer Candidate School. He quickly excelled, receiving Outstanding Achievement Awards for his academic excellence and his physical training. He was first in his class in each of the basic, intermediate, and advanced portions of his training, was placed on the Commodore's

> List for academic and flight achievement, and was named top student flight officer.
>
> After completing his tenure at AOCS and earning the designation of Naval Flight Officer, Thorne spent thirteen months training as a bombardier/navigator in the A-6 Intruder. He then joined Attack Squadron VA-65 at the Naval Air Station in Oceana, Virginia, where he continued to excel, impressing his commanding officers with his leadership and aviation skills.

Thorne v. United States Dep't of Defense, 916 F. Supp. 1358, 1361 (E.D. Va. 1996) (App. 18a).

In the spring of 1992, various candidates for President campaigned on their positions to extend or to end the ban on gays serving in the military. *See e.g., The Issue: Barring Gays from the Military*, The Associated Press, Mar. 16, 1992, *available in* 1992 WL 5289570. In May of that year, and only months before the Presidential election, Lt. Thorne appeared on the ABC news program *Nightline* with Rep. Pat Schroder. *Nightline* was featuring a discussion on legislation which had been introduced by Rep. Schroder that same day to end the ban then in existence on military service by gays and lesbians. During the broadcast, Lt. Thorne joined Rep. Schroder in urging the public to advocate an end to the ban and to elect candidates who would support an end to the ban. *Nightline*, ABC News, May 19, 1992, *available in* LEXIS, News Library, ARCNWS file. Lt. Thorne believed that public disclosure of his orientation as a successful, well-adjusted, and respected military officer was critical to advancing the legislative efforts to end the ban. During the program, Lt. Thorne publicly disclosed his homosexual orientation. Before

doing so, he advised his squadron Commanding Officer of his intention to appear on the program and to participate in this national debate, stating, "I take these steps in the hope that I might make the Navy a better and more tolerant institution." COA App. 391.

Within days of his appearance on *Nightline*, Lt. Thorne received notification of discharge proceedings brought by the Navy against him for his statements acknowledging his homosexuality. These discharge proceedings were widely publicized in the national media. *E.g.*, Arthur P. Brill, Jr., *The Grounding of Lt. Thorne*, Wash. Post, June 2, 1992, at A19. In May 1993, after a Board of Inquiry recommended his discharge based on his acknowledgement of homosexuality, the Navy placed Lt. Thorne on inactive standby reserve. COA App. 164. On January 23, 1994, the Navy issued Official Recall Orders pursuant to a stipulation by Lt. Thorne and Defendants before the United States District Court for the District of Columbia on January 7, 1994. COA App. 163.

On January 31, 1994, Lt. Thorne reported for duty to the Commander, Naval Air Systems Command ("NAVAIRSYSCOM"). Upon his return to active duty, Lt. Thorne provided letters to the Commander, NAVAIRSYSCOM, and Cdr. Luigart, his commanding officer, assuring them that his previous declaration of homosexuality would in no way impede his duties. COA App. 168.

Once again, the Navy began proceedings before a Board of Inquiry, this time under the new "Don't Ask, Don't Tell" law. At the hearing, the Navy presented no evidence to the Board of any homosexual acts or other forbidden conduct on the part of Lt. Thorne, instead proceeding against Lt. Thorne on the basis of his

statements that he is gay, a life insurance policy, and Lt. Thorne's association with a "known" homosexual.

At the conclusion of the hearing, by a unanimous vote, the Board of Inquiry found that the statements made by Lt. Thorne raised the presumption of homosexual conduct -- a propensity or intent to engage in homosexual acts -- as set forth in the regulations. Further, the Board found that Lt. Thorne made no attempt to rebut the presumption. Accordingly, the Board recommended that Lt. Thorne be separated with an honorable discharge.

While a review of this recommendation was pending, Cdr. Luigart submitted a fitness report on Lt. Thorne to the Commander, NAVAIRSYSCOM, in which he noted that Lt. Thorne was "[t]he most dynamic and ingenious Lieutenant I have had the pleasure to command." COA App 170. Subsequently, the highest echelons of the Navy officially recognized that, as an openly homosexual naval officer, Lt. Thorne performed effectively and that his presence had no deleterious effect on unit cohesion and morale. On January 24, 1995, after the second Board of Inquiry recommended discharge because Lt. Thorne said he is gay, the Secretary of the Navy awarded the Navy Achievement Medal to Lt. Thorne for professional achievement from January 1994 to October 1994. The accompanying Citation stated: "Lieutenant Thorne's superb leadership, exceptional professionalism, and total devotion to duty reflected credit upon himself and upheld the highest traditions of the United States Naval Service." COA App. 171.

Despite the military's praises and awards, the Secretary of the Navy for Manpower and Personnel discharged Lt. Thorne from the United States Naval

Reserve for reasons of "homosexual admission" on March 6, 1995. App. 45a.

The Courts Below

The United States District Court for the Eastern District of Virginia issued a Memorandum Opinion on March 4, 1996, stating that the record before it prevented an adequate consideration of the constitutionality of "Don't Ask, Don't Tell." App. 16a. The court directed the parties to supplement the record as to the rebuttability of the policy's presumption of homosexual conduct following a servicemember's declaration of homosexuality. App. 43a. While the parties were briefing that issue, the United Stated Court of Appeals for the Fourth Circuit issued a decision *en banc* upholding the constitutionality of the "Don't Ask, Don't Tell" policy. *Thomasson v. Perry*, 80 F.3d 915 (4th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 358 (1996).

The District Court issued a second decision on November 20, 1996. App. 3a. In that decision, the court rejected petitioner's argument that *Thomasson* did not dispose of the issue presented by the court, App. 10a, and further found that the presumption in the policy was rebuttable, App. 14a. The court accordingly found that the policy did not violate the First Amendment. The court did not address petitioner's equal protection argument.

In a *per curiam* decision dated April 9, 1998, the United States Court of Appeals for the Fourth Circuit affirmed the District Court decision. App. 1a.

REASONS FOR GRANTING THE PETITION

This case presents issues of exceptional constitutional importance. At issue is not only whether Congress is constitutionally permitted to suppress a statement of identification by a military servicemember, but also whether Congress may constitutionally base such a restriction of self-identification on the assumption that the message may offend the sensibilities of other military officers. Moreover, this case challenges the notion that Congress may constitutionally restrict the speech of honest homosexuals without restricting similar speech by other servicemembers. The overbreadth of the restriction is without parallel: the restriction on a servicemember's ability to tell someone he or she is gay applies even to statements made off-base, while on leave, to civilians or family members. This restriction exists despite the express findings in the Act that homosexuality is not incompatible with military service.

The issues presented by this Petition arise in a most sensitive context. Not presented by the Petition is any challenge to the military's prerogative to discharge military officers for engaging in any conduct that is proscribed for all servicemembers under the Military Code or, indeed, threatening to do so. Indeed, the only justifications offered to support "Don't Ask, Don't Tell" is as a means of implementing a prohibition on homosexual acts that in itself erects an unjustifiable distinction in treatment between gay and heterosexual servicemembers violative of the Fifth Amendment's guarantee of equal protection of the laws. Yet the challenged policy chooses as a means of implementing that objective a tack that appears on its face to be designed to inflict maximum damage to First

Amendment and equal protection rights and the values those rights reflect.

The military disclaims any interest in barring officers from the military because they have a homosexual orientation. Moreover, no one disputes that allowing homosexuals to speak out, to address the perceived forms of discrimination against them, and to make reference to their own sexual orientation in doing so -- just as Lt. Thorne did here to dramatize the unfairness and inequity that arises from the stereotypes and misconceptions that are used to justify such discrimination -- represent forms of political speech at the core of our First Amendment values and our equal protection rights to engage in the political process.

The "Don't Ask, Don't Tell" policy nonetheless purports to authorize discharge -- and effectively compels discharge of a large number of people -- because of one's public speech, attesting to one's homosexual orientation. Thus, the exercise of one's free speech rights, confirming a fact that the military would not regard as a cause of discharge, nonetheless becomes the basis for discharge. The fact of one's homosexual orientation is not sufficient for discharge, nor does it trigger an inquiry. It is the person's willingness to speak honestly about this subject that provides the decisive criterion for discharge. That the policy is structured this way is a restriction on speech because the speaking of the words alone gives rise to the liability. And it is restriction on speech and a citizen's right to engage in the political process that present a direct assault on core constitutional values. The speech in question is of unquestioned political importance. But so too is it of unquestioned personal importance, striking at the core of a person's being and privacy.

The courts below found that there was really no restriction at issue on speech because the presumption created by the public attestation of one's homosexual orientation is rebuttable. But that view fails to give proper weight to the fact that it is only speech on the subject that gives rise to the inquiry. A restriction imposed only by virtue of speaking out is a restriction on speech. Under the policy, a homosexual orientation itself is simply not a basis for triggering any inquiry; a statement of that orientation, however, is and places a dramatic burden on the speaker to rebut the inferences that the policy itself requires a factfinder to draw from it. By affording such vast weight to the speech itself, the policy affords no reasonable respect for the rights and interests of servicemembers.

Moreover, even if the government were able to base the policy on a demonstration that a willingness to speak out to attest to one's homosexual orientation might have some logical connection to the possibility of future homosexual acts as defined by the policy (and not acts proscribed for all servicemembers by the Military Code), that presumption would fail because the acts proscribed by the policy are not proscribed for all servicemembers, but only for gay and lesbian servicemembers. The Constitution demands that if the military is to ban activities such as kissing and hand-holding for one class of people, it must ban those activities for all of its servicemembers.

Finally, the courts below entirely ignored Petitioner's equal protection argument that the policy irrationally used historic stereotypes to discriminate against gays and lesbians *and* crushed the ability of gays and lesbians to urge the public to support an end to the ban.

Despite clear precedent from this Court to the contrary, the lower courts have ruled that Congress does not offend the Constitution when it prohibits a servicemember from *ever* saying -- without the stigma and trauma of a full Board of Inquiry proceeding -- the honest words "I am gay." These courts have similarly ruled that Congress may constitutionally allow non-verbal expressions of homosexuals to be the basis of a servicemember's discharge, without applying the same standard to heterosexuals. Moreover, those courts have allowed invidious and irrational prejudice to be the basis on which the policy is advanced. The Constitution's guarantees of equal protection and freedom of speech and association demand that the "Don't Ask, Don't Tell" statute and directives be struck down.

I. This Case Presents Questions of Exceptional Constitutional Importance That Have Been Wrongly Decided By the Courts Below

A. The "Don't Ask, Don't Tell" Policy Violates Lt. Thorne's Core First Amendment Rights To Freedom Of Speech And Association.

1. Participation in the political process is at the heart of First Amendment protections of speech and association. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-71 (1964). As such, political speech has always received the highest level of constitutional protection from this Court. *New York Times*, 376 U.S. at 270 (finding that the First Amendment protection of speech arises from a "profound national commitment" to uninhibited debate on public issues). Freedom of association is inexorably

linked to effective advocacy on important political issues, hence government restrictions on association are also reviewed with the strictest constitutional scrutiny. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933 (1982); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

Simply put, Lt. Thorne was discharged for participating in the national debate regarding the status of homosexuals in the military. At the height of this debate and on a nationally respected news program -- ABC's *Nightline* -- he "came out of the closet." In that highly charged political environment, his statement of identity was a clear and profound political statement and an act of expressive association. *Roberts*, 468 U.S. at 622 (finding that "according protection to collective effort on behalf of shared goals" is important to preventing suppression of minority opinions). His statements and actions, as a gay man, were at the core of his ability to add his voice to the political process. *Clairborne Hardware Co.*, 458 U.S. at 933 ("One of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means.").[2]

As written, and as applied to Lt. Thorne, the policy punishes speech. The DoD Directives implementing the

---

[2] Lt. Thorne's interest in the national policy on the status of homosexuals in the military was particularly acute. The military's ban on homosexuals forced him to live a lie, keeping an essential element of his identity secret from friends, family and colleagues. Ironically, while purporting to allow homosexuals to serve, the new policy requires gay servicemembers to lie to those around them about who they are.

policy state that "homosexual orientation is not a bar to continued service . . . ." DoD Dir. No. 1332.30, Enc. 2, ¶ C (App. 60a). The Navy's own conduct in implementing "Don't Ask, Don't Tell" must doom the policy. In discharging Lt. Thorne, the Navy offered evidence only as to actions that are central to the First Amendment's protections against restriction of speech and association.

While the government has claimed since its formulation that the policy is aimed at conduct, such semantics cannot save the policy from the reality that, in First Amendment terms, its restrictions on speech are more than incidental; they are content-related and aimed at protecting the sensibilities of those who might hear the message. It is the content of the statements and not the actions of an individual that is the focus of the Directive's prohibition. The message communicated -- that an officer is gay -- is objectionable to the military. A law is content-based if it distinguishes "favored speech from disfavored speech on the basis of the ideas or views expressed." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 643 (1994). Had Lt. Thorne declared that he was a heterosexual or stayed silent about his homosexuality, the Navy would not have proceeded with a Board of Inquiry against him.

Moreover, the "Don't Ask, Don't Tell" policy restricts speech based on the viewpoint expressed by the speaker. The First Amendment prohibits viewpoint-based restrictions on speech even where the government would otherwise be permitted to regulate the entire category of speech. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (finding regulation of only the "hate speech" subset of fighting words to be unconstitutional viewpoint discrimination). This Court has made clear

that statements of self-identification about sexual orientation express a specific viewpoint. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 570 (1995); *see also Elzie v. Aspin*, 897 F. Supp. 1, 5 (D.D.C. 1995) (finding that the *Hurley* Court recognized that the statement "I am homosexual" expressed a viewpoint). Accordingly, even if the military could constitutionally proscribe all discussion of sexual orientation, it cannot prohibit only declarations of homosexual orientation. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (holding that the state cannot engage in viewpoint discrimination, even when it has the right to exclude some content).

2. Both content- and viewpoint-based restrictions on speech are "presumptively invalid" under the First Amendment. *R.A.V.*, 505 U.S. at 382. In *Police Dep't of Chicago v. Mosely*, this Court declared, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." 408 U.S. 92, 95 (1972). This Court applies the strictest level of scrutiny to such regulations, requiring the government to bear the burden of proving that the "regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987).[3]

---

[3] Content- and viewpoint-based restrictions are unconstitutional regardless of whether they actually prohibit speech or merely impose additional burdens on speech. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 109 (1991) (invalidating a law that prevented criminals from profiting from books and other works describing their crimes by requiring payment of proceeds to a

(continued...)

While this Court has recognized that the special role of the military in our society allows some restrictions of servicemembers' First Amendment rights, those restrictions must "protect a substantial government interest *unrelated to the suppression of free expression.*" *Brown v. Glines*, 444 U.S. 348, 354 (1980) (emphasis added); *see also, Greer v. Spock*, 424 U.S. 828, 838-39 (1976) (upholding a restriction on civilian speech on military bases after finding "no claim that the military authorities discriminated in any way" based on the speaker's views and that the regulation was not aimed at the suppression of free expression). This Court does not defer to government acts that restrict speech because of the viewpoint expressed. *Rosenberger*, 515 U.S. at 829; *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993). The same standard should apply to military policies. Accordingly, the Department of Defense must meet the highest standard of review for this viewpoint- and content-based restriction on speech.

3. The restrictions on communication in the "Don't Ask, Don't Tell" policy are not based on any compelling or even rational government interest. That the policy allows gays and lesbians to serve, albeit in the closet, is conclusive proof that there is no concern about the fitness of gays and lesbians to serve. Rather, the policy is based on the fears and prejudices of

---

(continued. . .)

crime victims board). Unconstitutional chilling effects on speech can take many forms. *See, e.g., Simon & Schuster*, 502 U.S. 105 (financial consequences); *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) (same); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (employment consequences); *R.A.V*, 505 U.S. 377 (1992) (criminal sanctions).

heterosexual servicemembers, masquerading under the terms "unit cohesion," "discipline," "good order," and "morale." 10 U.S.C. § 654(a)(15) (App. 50a).

Prejudice, fear, disapproval, or discomfort of the listener have never been a legitimate reason for stifling speech. Heterosexual prejudice is no different and is not a valid justification for regulating the speech of servicemembers. In *Texas v. Johnson*, for example, this Court held that the government may not punish speech simply because the audience "takes serious offense [to a] particular expression." 491 U.S. 397, 408 (1989). *See also United States v. Eichman*, 496 U.S. 310, 318 (1990) (finding that government's interest in suppressing speech does not become more "weighty as popular opposition to that speech grows"); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation."). Similarly, the First Amendment forbids the government from silencing speech based on the anticipation of a hostile audience reaction. *Terminiello v. Chicago*, 337 U.S. 1 (1949).

Even assuming, *arguendo*, that the unit cohesion rationale has some grounding in reality, the policy is not narrowly tailored to achieve those objectives. It targets those who say they are gay, but never engage in the prohibited conduct. Thus, gays and lesbians (such as Lt. Thorne) who are expressly permitted to serve under the policy can be subjected to the stigma and trauma of a Board of Inquiry proceeding absent any proof of prohibited conduct.

4. The fact that the policy creates a rebuttable presumption of acts -- themselves discriminately prohibited -- rather than an outright ban on the speech does not redeem its constitutionality. The First

Amendment does not protect only against direct punishment of speech; it also guards against less absolute restrictions that might have a chilling effect on speech. *See, e.g., Nationalist Movement*, 505 U.S. 123 (holding that a variable fee requirement for demonstrations created an unreasonable burden on speech). This is particularly true in situations in which a presumption of misconduct arises from a person's status, as it does under the "Don't Ask, Don't Tell" policy. *See Robinson v. California*, 370 U.S 660, 666 (1962).

First Amendment overbreadth challenges do not require that there be no constitutional application of the law. *See Nationalist Movement*, 505 U.S. at 129 ("an overbroad regulation may be subject to facial review and invalidation even though its application in the case under consideration may be constitutionally unobjectionable"). Indeed, the very purpose of an overbreadth challenge is to allow a petitioner to whom the law has been applied in a constitutional manner to mount a facial challenge to the law on the theory that its unconstitutional application in another case might have a chilling effect on protected speech. *Id.* ("[The overbreadth doctrine] is based on an appreciation that the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court.").

This Court's recent holding in *Reno v. ACLU*, ___U.S. __, 117 S. Ct. 2329 (1997), further clarifies the appropriate standard of review for facial challenges to laws containing affirmative defenses. In *Reno*, the Court held that including an affirmative defense to a restriction on speech is insufficient to overcome a facial challenge to a content-based restriction if the law has a chilling effect on speech. *Id.* at__, 117 S. Ct. at 2349.

The Court invalidated the "indecent speech" portion of the Communications Decency Act which, like the "Don't Ask, Don't Tell" policy, purported to allow affirmative defenses to an otherwise blanket content-based prohibition on speech. Despite the fact that some internet providers of indecent materials may have been able to employ the affirmative defense with success, the Court held the defenses "illusory." *Id.*

The possibility of rebutting the presumption created by a declaration of lesbian or gay identity is even more problematic. The possibility of being called to appear before a Board of Inquiry and being forced to discuss the most intimate and private details of sexual activities and desires are, in and of themselves, sufficiently traumatic and stigmatizing to have a chilling effect on speech. In addition, because the policy specifically recognizes that a homosexual orientation is not a bar to successful military service, the revelation of that orientation should create no additional bar. It is thus speech that is punished.

B. Petitioner's Right to the Equal Protection of the Laws Has Been Violated.

The "Don't Ask, Don't Tell" policy treats gay and lesbian servicemembers differently than it treats heterosexual servicemembers. Gay and lesbian servicemembers who disclose their sexual orientation or engage in non-sexual expressive communication are implicated by the policy, while heterosexual servicemembers who do the same are not. This classification is offensive to the Constitution and demands strict scrutiny.

1. This Court has long recognized the fundamental right to participate fully in the political process. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (implying that heightened scrutiny should be applied to equal protection challenges to legislation that "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation"). The government may not extinguish the voice of any minority group or make "it more difficult [for that group] to enact legislation on its behalf." *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 468 (1982) (quoting *Hunter v. Erickson*, 393 U.S. 385, 393 (1969)); *accord Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626-28 (1969); *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).[4] A classification infringing on a fundamental right invokes strict scrutiny review under the constitutional guarantee of equal protection. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).[5]

---

[4] Numerous other decisions of this Court have recognized the fundamental right of minorities to have an opportunity "to influence the political process." *Davis v. Bandemer*, 478 U.S. 109, 132-33 (1986); *accord Board of Estimate of City of N.Y. v. Morris*, 489 U.S. 688, 693 (1989); *cf. Romer v. Evans*, 517 U.S. 620, 633 (1996) (using similar language but deciding the case on a basis other than fundamental rights).

[5] This Court could also hold that this legislation unconstitutionally invokes a suspect classification entitled to heightened scrutiny. It is clear that homosexuals have experienced a history of discrimination that is unrelated to their abilities, *see Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality), and are members of a discreet and insular class, *see Graham v. Richardson*, 403 U.S. 365, 371-72 (1971). Moreover, various scientific studies conducted within the last ten years have revealed that sexual orientation has a biological basis. Thus, under established precedent, classifications based

(continued...)

While courts normally provide deference to a statute enacted by a legislative body, *see, e.g., Vance v. Bradley*, 440 U.S. 93, 97 (1979), this deference assumes an open democratic process. When legislation "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities," heightened scrutiny is required because the process alone can no longer prevent arbitrary discrimination by the majority. *Carolene Products Co.*, 304 U.S. at 152-53 n. 4. Therefore, "[a]ny unjustified discrimination in determining who may participate in political affairs . . . undermines the legitimacy of representative government" and must be "carefully and meticulously scrutinized." *Kramer v. Union Sch. Dist.*, 395 U.S. at 626-28; *Crawford v. Board of Educ of Los Angeles.*, 458 U.S. 527, 546 (1982) (Blackmun, J., concurring).

The decisions below cannot be harmonized with these decisions. In fact, both the Court of Appeals and the District Court ignored Petitioner's argument that the "Don't Ask, Don't Tell" policy violates the fundamental *equal protection* right to engage in the political process.

The military's policy of banning gay servicemembers from identifying themselves presents this Court with a unique and unprecedented challenge to a servicemember's right to voice his or her opinion about pending legislation *as a gay person.*[6] "Coming

---

(continued. . .)

on sexual orientation, like classifications based on other immutable characteristics, must be judged by heightened scrutiny. *See Plyler v. Doe*, 457 U.S. 202, 223 (1981).

[6] In this case, the lower courts both relied upon the Fourth Circuit's decision in *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996), *cert. denied*, __U.S. __, 117 S. Ct. 358 (1996). However, *Thomasson*, and other cases challenging the military's policy,

(continued...)

out" is a critical element of the gay civil rights movement in that it allows gays and lesbians to be seen for who they are. However, gay servicemembers who believe that negative attitudes about them will not change without disclosure of their sexual orientation are prohibited from full participation in that debate. As Tracy Thorne's own experiences demonstrate, the military's policy crushed the ability of openly gay servicemembers to "come out" and speak in favor of attempts to end the policy or participate fully in a national political debate. Threatened with an end to their careers and futures, the policy essentially forces gay servicemembers to sit in silence on the sidelines of this debate that is critical to *their* lives.

Lt. Thorne's participation in the 1992 debate to end the military's ban on homosexual servicemembers taught a lesson to others who may have contemplated participation. After Lt. Thorne became an example of what would happen to those who advocated legislative change, hundreds of supporters did not testify before Congress because of fear of retaliation.[7] Similarly, others no doubt refrained from petitioning their elected representatives to end the ban. Thus, although gay servicemembers and their supporters could theoretically speak out against the ban, their voice in the debate was substantially and unequally diminished by the real threat that they would lose their military career and their future

---

(continued. . .)

did not involve an officer speaking out as part of a political debate.

[7] Senator Edward Kennedy alone received comments from over 100 people who wished to testify in opposition to the ban but who were afraid to do so. S. Rep. No. 103-112 (1993).

if they asserted their right to engage in the political process. They therefore could not urge their representatives to end the ban or urge the voting public to support candidates who advocated ending the ban. Not surprisingly, the resulting one-sided "debate" over the "Don't Ask, Don't Tell" policy effectively blocked the democratic process from overcoming prejudices and resulted in the passage of unconstitutional legislation.[8] Any policy that suppresses the participation in the political process of an entire segment of the population -- especially the segment being affected by the national debate -- is noxious to the most basic guarantees of the Constitution.

2. Regardless of the level of scrutiny the Court applies, the "Don't Ask, Don't Tell" policy cannot stand. It is well established that governmental policies based on invidious or irrational prejudice cannot serve a legitimate governmental purpose and are, accordingly, unconstitutional. In *Palmore v. Sidoti*, 466 U.S. 429 (1984), the Court explained:

> Private biases may be outside the reach of the law, but the law cannot, directly or indirectly give them effect. "Public

---

[8] Moreover, supporters of the ban also blocked the democratic process from considering all opinions. For example, the Senate Armed Services Committee ignored DOD studies that provided empirical evidence that the presence of open homosexuals would not degrade unit cohesion. S. Rep. No. 103-112 (1993). The same Committee chose not to allow testimony about a GAO study of foreign experiences with homosexual integration. The latter study concluded that expectations of difficulty in integrating open homosexuals were greatly overstated. *Id.* at 313-14.

> officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held."

Id. at 433 (citation omitted); *see also City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 447-50 (1985). Recently, the Court applied this principle in the context of sexual orientation. In *Romer v. Evans*, 517 U.S. 620 (1996), the Court invalidated a state amendment based upon the language of the amendment and the circumstances surrounding its adoption. The Court stated that these facts "raise[d] the inevitable inference that the disadvantage [that it] imposed [was] born of animosity toward the class of persons affected." Id. at 634. Moreover, as the Court observed, "[i]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Id. (quoting *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (emphasis in original).[9]

In this case, the legislative history provides overwhelming evidence that the policy's primary purpose, including by its imposition of different rules of

---

[9] On Petitioner's equal protection claims, no deference is due to the government because this case involves the military. *Rostker v. Goldberg*, 453 U.S. 57, 71 (1981); Kelly E. Henriksen, Note & Comment, *Gays, the Military, and Judicial Deference: When the Courts Must Reclaim Equal Protection As Their Area of Expertise*, 9 Admin. L. J. Am. U. 1273 (Winter 1996). Indeed, deference to the military can set a dangerous precedent. *See Korematsu v. United States*, 323 U.S. 214 (1944).

conduct, was to accommodate prejudice against gays and lesbians.[10] Moreover, in several other cases, the testimony of military personnel has confirmed the prejudicial basis for the policy. For example, in *Cammermeyer v. Aspin*, 850 F. Supp. 910 (W.D. Wash. 1994 both General Otjen and former Assistant Secretary of Defense Dorn "testified to the effect that the government's objection to homosexual service is based solely on the fears and prejudice of heterosexual servicemembers." *Id.* at 925. Bowing to these prejudices by military personnel -- and by members of Congress -- is unconstitutional. *See United States v. Virginia*, 518 U.S. 515, 542-46 (1996) (rejecting similar arguments used to justify denying women admission to VMI).

3. Even if the Court finds that there is no First Amendment or other political participation protection assigned to the statement that raises the presumption in the policy, the equal protection problems with "Don't Ask, Don't Tell" remain. The policy proscribes conduct by homosexual servicemembers that is not similarly proscribed for heterosexual servicemembers such as hand-holding and kissing. Yet, the government, having found that homosexuals are fit to serve in the military, can show no legitimate purpose for limiting those acts

---

[10] *See, e.g., Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings on H.A.S.C. No. 103-19 Before the Comm. on Armed Services House of Representatives*, 103d Cong., 1st Sess. at 90-91(1993) (Statement of Col. John Ripley, (referring to gays as "walking repositories of disease" and predicting that the military "will become one of deviants"); *id.* at 319-20 (Statement of Rep. Bob Dornan) ("homosexual[s'] . . . behavior and beliefs directly contradict the cultural beliefs of the overwhelming majority of our middle class").

by its gay and lesbian servicemembers. The only basis on which the government relies for its proscription of these activities is the discomfort these activities may invite on other servicemembers. The reaction of others, however, is not a legitimate basis for the proscription of these activities under the Constitution. *See Palmore*, 466 U.S. 429; *Cleburne*, 473 U.S. 432.[11]

4. Finally, in determining whether legislation violates the Equal Protection Clause, this Court has long recognized that it has never been confined to traditional notions of equality -- particularly when historic stereotypes deny citizens the opportunity to engage in certain careers or educational opportunities. In *United States v. Virginia*, this Court noted that historic fears about the "dangers" of allowing women into certain professions and educational institutions were "once routinely used to deny rights or opportunities." 518 U.S. at 542-46.[12] The Court therefore rejected the notion that

---

[11] This case is *not* about the military's criminal prohibition against sodomy and other forms of sexual conduct that apply to all servicemembers, regardless of sexual orientation. *See* 10 U.S.C. §§ 801 *et seq.* It is about the acts that are not prohibited by the Military Code but that are prohibited by the "Don't Ask, Don't Tell" policy -- acts prohibited for gay and lesbian servicemembers only. For example, a heterosexual servicemember who does more than that which is proscribed for homosexuals under the Act -- such as announcing an intent to commit sodomy or some other act prohibited by the Military Code with someone of the opposite sex or a propensity to do so on a regular basis -- does not implicate the Act's proscriptions. In addition, hand-holding or hugging by two people of the opposite sex -- even if unmarried -- garner no reaction by the policy, while the same conduct by two members of the same sex may result in discharge

[12] Among many others, the Court noted that women were denied police careers "based on fears that their presence would

(continued...)

the admission of women to VMI "would downgrade VMI's stature" or "would destroy . . . the sense of decency that still permeates the relationship between the sexes." *Id.* at 542-46 and 555 n.20.

This Court has also recognized that historic notions of equality will not restrict its analysis of whether legislation is unconstitutional. In *Harper v. Virginia State Bd. of Elections,* 383 U.S. 663 (1966), the Court explained,

> [T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. Notions of what constitutes equal treatment for the purposes of the Equal Protection Clause do change.

Id. at 669 (citing *Brown v. Board of Educ.*, 349 U.S. 294 (1955)).

In this case, the military and Congress have relied upon historic stereotypes to deny a military career and education to gays and lesbians who reveal that they are

---

(continued. . .)

undermine male solidarity, deprive male partners of adequate assistance, and lead to sexual misconduct." *United States v. Virginia,* 518 U.S. at 544 (internal quotations and citations omitted). These same arguments were relied upon by the military and Congress in implementing the "Don't Ask, Don't Tell" policy.

gay. The military also believes that service by open and honest gays and lesbians "would be against their self-image, that [of] the macho man -- having gays and lesbians in the force would not be in keeping with the image they see of themselves." *Nightline,* ABC News, May 19, 1992, *available in* LEXIS, News Library, ARCNWS File (comments of former Assistant Secretary of Defense Lawrence Korb). This Court should not allow such historic stereotypes to deny gay and lesbian citizens a career in the military, the educational opportunities that the military and its educational institutions present, or the prospect of training and networking that inevitably leads to promising civilian career opportunities after military service. *Cf. United States v. Virginia*, 518 U.S. at 551-54 (comparing educational and employment opportunities for VMI and VMIL graduates); *Rostker v. Goldberg*, 453 U.S. 57, 74 n.11 (denying a challenge to the all-male draft and noting that nothing in the all-male draft registration "restricts . . . opportunities for women to volunteer for military service"). In petitioner's case, the denial of the educational opportunities was particularly acute: his Commander noted in the fitness report prepared after Lt. Thorne's appearance on *Nightline*: "Has my highest Possible *[sic.]* recommendation for promotion, command and further education at the postgraduate level." COA App. 170.

II. Discharges of Gay and Lesbian Servicemembers Under "Don't Ask, Don't Tell" Are Increasing at An Alarming Rate.

Despite the purported tolerance espoused by the policy, gay and lesbian servicemembers are being discharged under the policy at increasing and alarming rates. The number of gay and lesbian servicemembers discharged under "Don't Ask, Don't Tell" has increased each year since 1994. C. Dixon Osburn et al., *Servicemembers Legal Defense Network, Conduct Unbecoming: The Third Annual Report On "Don't Ask, Don't Tell, Don't Pursue"* (1997). Almost 1,000 servicemembers were discharged under the policy in 1997 alone, a number that *surpasses* the number discharged annually under the former ban on homosexuals in the military between 1990 and 1992. *Id.*; ABC Nightly News, Apr. 6, 1998, *available in* LEXIS, News Library, ARCNWS File.

There is no reason to believe that these numbers will decrease. The "Don't Ask, Don't Tell" policy is administered and enforced by the same bigotry that gave it birth. Gay and lesbian servicemembers who want to serve their country while living an open and honest life are the victims. This victimization will continue absent guidance from this Court.

CONCLUSION

The United States Constitution prohibits the suppression of expression and denial of equal protection on the basis of bigotry and prejudice. The "Don't Ask, Don't Tell" policy ignores these constitutional guarantees. The petitioner's writ of certiorari should be granted.

Respectfully submitted,

Clifton S. Elgarten*
*Counsel of Record
Christopher M. Farris
Barry M. Parsons
Jeffrey E. Greene

Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2500